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No. 88-388

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

FAIRNESS IN MEDIA,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA and CBS INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

GEORGE VRADENBURG III
ELLEN ORAN KADEN
CBS INC.
51 West 52 Street
New York, New York 10019
(212) 975-3351

October 3, 1988

RICHARD E. WILEY
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Counsel of Record for Respondent CBS Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the Court of Appeals for the District of Columbia Circuit was correct in affirming the Federal Communications Commission's decision not to conduct further investigation into an alleged transfer of control of CBS Inc. in circumstances where: (a) the decision at issue is committed by law to agency discretion and is thus unreviewable; and (b) the agency in fact conducted an investigation, compiled a detailed record, and reached a conclusion on the merits that was fully in accord with established precedent.

RULE 28.1 LIST

CBS Inc. has the following parent companies, subsidiaries* and affiliates to list pursuant to Rule 28.1:

Alexandra Film Productions, Inc.
Aspenfair Music, Inc.
Bala Cynwyd Associates [General Partnership]
Beverlyfax Music, Inc.
CBS Broadcast International of Canada Limited
CBS Broadcast Services Ltd.
    CBS Pension Trustees U.K. Limited
CBS FMX Stereo Inc.
CBS/FOX Company, The [General Partnership]
    CBS/FOX VIDEO (Holdings) Ltd.
        CBS/FOX VIDEO Limited
    CBS/FOX VIDEO (Germany) G.m.b.H.
    CBS/FOX VIDEO (South Pacific) Pty Ltd.
    CBS/FOX VIDEO (Canada) Ltd.
    CBS/FOX VIDEO (Espanola) S.A.
    CBS/FOX VIDEO French Film Licensing Corp.
        CBS/FOX VIDEO (France) S.A.
    CBS/FOX VIDEO International S.A.R.L.
    CBS/FOX VIDEO (New Zealand) Limited**
    CBS/FOX VIDEO (Far East) K.K.
CBS Gramophone Records & Tapes (India) Ltd.***
CBS/MTM Company [General Partnership]
CBS Urban Renewal Corporation
CJG Productions Inc.
Columbia Television, Inc.
Katy Film Productions, Inc.
Meadowlands Parkway Associates [General Partnership]

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* Inactive subsidiaries are not included in this listing.

** An additional .01 percent of voting shares is owned by CBS/FOX VIDEO (South Pacific) Pty. Ltd.

*** Subject to agreement of sale dated November 19, 1987 with Sony Corporation; awaiting deferred closing.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent CBS Inc. respectfully requests that this Court deny the petition for writ of certiorari seeking review of the District of Columbia Circuit's opinion in this case (*Fairness in Media v. FCC*, No. 87-1217 (D.C. Cir. June 8, 1988) (per curiam)). That opinion is not published, but is reproduced in the appendix to the petition at 1a.

During the course of 1985, there was intense public speculation about the prospect of a change in control at CBS Inc. In January of that year, Fairness in Media ("FIM"), a group led by U.S. Senator Jesse Helms, urged others to purchase CBS stock in an effort to force a change in the editorial content of CBS News broadcasts.

Arbitrageur Ivan Boesky subsequently acquired a substantial amount of CBS stock, leading to public conjecture that CBS might be sold or that control of the corporation might otherwise be transferred. Finally, in April of 1985, Turner Broadcasting System, Inc. initiated an effort to acquire CBS through a leveraged exchange offer. In each of these instances, the CBS Board of Directors concluded that the interests of the shareholders would best be served by maintaining the corporation's independence, and strenuously opposed the effort to undermine that objective.

Following a July 3, 1985 announcement that CBS would institute an exchange offer for a portion of its own shares, Loews Corporation purchased approximately 9.9 percent of CBS's common stock. The CBS exchange offer was consummated on August 1, 1985. Soon thereafter, Turner Broadcasting announced the withdrawal of its effort to acquire the corporation.

In October of 1985, the Chairman of Loews, Mr. Laurence Tisch, advised the Chairman and Chief Executive Officer of CBS, Mr. Thomas Wyman, that Loews intended to purchase up to 25 percent of the corporation's common stock. Mr. Tisch stated that the purchases would be for investment purposes.[1] Subsequently, the CBS Board determined that the proposed increase in Loews's stock holdings would be consistent with the continued independence of CBS and the interests of the other CBS shareholders. On October 16, 1985, Mr. Tisch was invited to join the CBS Board.[2]

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[1] This statement is in accord with representations made by Loews in its filings with the Securities and Exchange Commission.

[2] Prior to Mr. Wyman's resignation from the CBS Board, the Board consisted of three "inside" directors who were current or former employees of CBS and 11 "outside" directors. The "inside" directors were Mr. Wyman; William S. Paley, the Founder Chairman of CBS, who established the company and served as Chairman of the CBS Board from 1928 to 1983; and Walter Cronkite, the former anchor of the CBS Evening News and currently a Special

At a regularly scheduled meeting of the CBS Board on September 10, 1986, the directors were informed by Mr. Wyman that he had received an overture from The Coca-Cola Company which could lead to discussions contemplating the purchase of CBS by Coca-Cola. Mr. Wyman recommended that the Board authorize him to furnish certain confidential corporate information to Coca-Cola and appoint a committee of outside directors to review and analyze any offer that might be forthcoming. Mr. Wyman's proposal once again raised the question whether CBS should remain an independent company. Mr. Paley and Mr. Tisch each responded to Mr. Wyman's proposal by expressing the view that CBS should not be offered for sale to anyone at that time and by stating that their respective holdings of CBS stock were not for sale.[3] Mr. Wyman then withdrew from the meeting.

In the ensuing discussion, the consensus of the remaining directors was that CBS should continue to be operated as an independent company. There followed a discussion of perceived shortcomings in Mr. Wyman's management of CBS. At the conclusion of this discussion, Mr. Cronkite and Mrs. Marietta Tree, one of the outside directors, stated that they believed that Mr. Wyman should resign for the good of the corporation and its shareholders.

Mr. Paley then proposed that Mr. Wyman be permitted to resign, that Mr. Paley be named acting Chairman of

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Correspondent to CBS News. With the exception of Mr. Wyman, all of the directors who were in office when Mr. Tisch joined the Board continue to this date to serve on the Board. In addition, Mr. Preston Robert Tisch, the brother of Laurence Tisch, joined the Board in September 1988.

[3] In September 1986, Loews owned 24.9 percent of CBS's common stock which, because of outstanding voting preferred stock, represented approximately 23.6 percent of CBS's outstanding voting interests. Mr. Paley controlled 8.1 percent of the company's outstanding common stock.

the Board and that the Executive Committee of the Board (to consist of Mr. Paley, Mr. Tisch and several outside directors) exercise the powers of Chief Executive Officer during a transition period pending selection of a new Chief Executive Officer. At this point, pursuant to the request of the other directors, Messrs. Paley and Tisch withdrew from the meeting.

An extended discussion followed, after which the eleven remaining directors unanimously agreed that it would not be in the best interests of the shareholders to solicit proposals for a sale of the corporation at that time. The directors also concluded that, as a consequence of this decision, Mr. Wyman would resign. After considering Mr. Paley's management proposal, however, the directors who were present decided that CBS would be best served by the appointment of a single acting Chief Executive Officer to manage the corporation during the transition period and that, in view of his qualifications, Mr. Tisch should be asked if he were willing to serve as acting Chief Executive Officer.

Mr. Tisch then rejoined the meeting. After being informed of the tentative conclusions reached by the outside directors and Mr. Cronkite, he expressed his willingness to serve as acting Chief Executive Officer if that was the wish of the Board. Accordingly, after accepting Mr. Wyman's resignation, the Board appointed Mr. Paley as acting Chairman of the Board and Mr. Tisch as acting Chief Executive Officer.[4]

Shortly after this Board meeting, FIM filed pleadings with the Federal Communications Commission contending that *de facto* control of CBS had been transferred to Loews without the approval of the Commission in violation of 47 U.S.C. § 310(d) (1982), demanding a prompt investigation, and urging that "sanctions" be imposed

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[4] On January 14, 1987, the CBS Board appointed Messrs. Paley and Tisch to serve in these positions on a continuing basis.

on CBS. FIM's "factual" assertions were based solely on reports of developments at CBS that were contained in newspaper and magazine articles.

In a September 17, 1986 letter from the Chief of the Federal Communications Commission's Mass Media Bureau, the Commission asked CBS to provide a detailed response to the allegation that there had been a transfer of control of the corporation. The CBS reply, submitted on October 1, 1986, included:

- a certified copy of the minutes of the September 10, 1986 Board meeting;
- a letter from Mr. Paley setting forth an explication of the pertinent facts;
- an affidavit from CBS Board member (and former FCC Chairman) Newton Minow, containing a further description of the actions of the Board; and
- a memorandum setting forth the corporation's overall analysis of the facts and the law.

Taken together, these documents provided a detailed description of the facts and circumstances surrounding the management changes at CBS. In addition, the CBS submission reviewed relevant administrative and judicial precedents concerning *de facto* transfers of control and noted that the concept of "control" for the purposes of Section 310(d) has a meaning that is not in accord with the definition adopted by FIM. Specifically, CBS pointed to the Commission's long-standing view that "influence" within a corporate structure is not synonymous with the statutory concept of "control;" that corporations ordinarily do not need agency approval to replace their managers, officers or directors; and that a substantial minority shareholder will not be found to have acquired control unless that individual has acquired the ability to "dominate" or "dictate" the affairs of the corporation.

Mr. Paley, in his letter to the Commission, stressed the fact that no new entity had assumed the power to direct the affairs of CBS, stating that:

> the very essence of recent events was that the Board of Directors of CBS reaffirmed and reasserted its overall responsibility for the affairs of CBS, and, once again, restated the commitment to independence that has been the hallmark of this corporation since I founded it over fifty years ago.

Mr. Paley noted further that while he and Mr. Tisch had similar views concerning Mr. Wyman's performance in office, "Mr. Tisch and I have no agreement or understanding with respect to the voting of our stock-holdings or the positions we will take on future issues to come before the Board." Mr. Minow similarly stated in his affidavit that "each of the directors exercised his or her own independent judgment in determining what actions would be in the best interests of CBS's shareholders" and that "[n]either Loews Corporation nor Mr. Tisch has obtained the power or the authority . . . to dictate or direct the Board's actions."

In an October 20, 1986 letter to Mr. Paley, the FCC concluded that the management change at CBS "occurred in the context of a corporation that has an active and independent Board of Directors that has been and remains openly antagonistic to CBS coming under the domination of any outside party." *Letter to William S. Paley*, 1 F.C.C. Rcd 1025, 1027 (1986), *reprinted in* Appendix to Petition for Certiorari at 9a. Accordingly, the Commission agreed with CBS's assessment that no transfer of control had occurred within the meaning of 47 U.S.C. § 310(d).

FIM then sought reconsideration of the Commission's decision. By order dated March 20, 1987, the Commission denied FIM's petition for reconsideration. *CBS Inc.*, 2 F.C.C. Rcd 2274 (1987), *reprinted in* Appendix to Petition for Certiorari at 11a. In doing so, it reiterated

its long-standing policy of examining all relevant events and circumstances, rather than relying on "a formulistic approach based on a particular level of minority holdings," in determining questions of *de facto* control. *Id.* at 2274 (Appendix to Petition for Certiorari at 12a). The Commission stated that in examining the facts in this case, it had found no evidence that "the changes initiated by Mr. Tisch were outside the scope of his authority as CEO or were made in opposition to the Board's wishes." *Id.* at 2274 (Appendix to Petition for Certiorari at 13a). It also found no evidence that the Board of CBS had lost "the ability to act independently, or that the other shareholders [who continue to control over 75 percent of the voting stock] have relinquished their franchises to Mr. Tisch, sufficient to demonstrate that a transfer, within the meaning of [Section 310(d)], has taken place." *Id.* at 2274-75 (Appendix to Petition for Certiorari at 13a).

FIM sought review of the Commission's decision on May 18, 1987. The FCC and intervenor CBS urged the court to dismiss the FIM petition for the three independent reasons that: (1) it was not filed on a timely basis; (2) FIM failed to establish that it had standing; and (3) the FCC's decision represents an unreviewable exercise of the agency's enforcement discretion. On the merits, the agency and CBS argued that the Commission had acted reasonably in concluding that no transfer of control occurred, and that it had reasonably concluded that further investigation of FIM's complaint was unnecessary.

Following oral argument, the court of appeals issued a per curiam unpublished opinion affirming the Commission's decision. In its June 8, 1988 decision, the court assumed but did not decide that FIM was "positioned to invoke court review," and concluded that:

> the Commission dealt reasonably and appropriately with the merits of the complaint. The facts before

> the Commission justified the determination that no transfer triggering a need for immediate investigation had occurred. Were agencies forced to prolong inquiries and to spend large resources whenever confronted with allegations, speculation or prediction of the kind petitioner presses, the expeditious scheduling of agency agendas and efficient execution of agency business would be severely impeded.

Fairness in Media v. FCC, No. 87-1217, slip op. at 1 (D.C. Cir. June 8, 1988) (per curiam), *reprinted in* Appendix to Petition for Certiorari at 1a.

REASONS FOR DENYING THE WRIT

As CBS argued before the court of appeals, the Commission's decision not to conduct a further investigation of FIM's complaint involved an unreviewable exercise of agency discretion. Nevertheless, when the court of appeals examined the merits of the case, it correctly found that the Commission's determination was reasonable. The decision in this case is fully consistent with established judicial precedent and the petition fails to raise any important questions of law.

I. The Commission's Decision Not To Conduct a Further Investigation Is Not Properly Subject to Judicial Review.

The FCC's decision not to conduct a further investigation or to institute enforcement action against CBS represents an unreviewable exercise of agency discretion. Judicial review is generally unavailable where action is committed to agency discretion by law. 5 U.S.C. § 701(a) (1982). In this case, the Commission's governing statute leaves to the agency's discretion determinations as to whether and in what circumstances it should initiate investigations or other enforcement actions involving alleged violations of Section 310(d).[5] Because the statute

[5] The statutory authority for Commission investigations and enforcement actions is found in 47 U.S.C. §§ 154(i), 154(j), 312, 401,

does not set forth any standard for the exercise of this discretion, there is no law for the courts to apply in reviewing the Commission's enforcement decisions. Those decisions are thus unreviewable. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (establishing presumption of unreviewability of agency decisions not to take enforcement action).

The *Dunlop* case relied upon heavily by petitioner is inapposite. *See Dunlop v. Bachowski*, 421 U.S. 560 (1975). In a later ruling, this Court characterized *Dunlop* as presenting "an example of statutory language which supplied sufficient standards to rebut the presumption of unreviewability." *Heckler v. Chaney*, 470 U.S. at 834. Unlike the instant case, where the Communications Act commits the decision whether or not to investigate complaints and institute proceedings to the agency's discretion, the statute being administered in *Dunlop* "quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power." *Id.*

II. The Court of Appeals Correctly Found That the Commission Reasonably Exercised Its Discretion in This Case.

Assuming *arguendo* that the Commission's determination was reviewable, it is evident that the court of appeals was fully justified in upholding the FCC's decision. The Commission's conclusion that no transfer of control has occurred is reasonable, fully in accord with past precedent, and amply supported by the facts contained in the record of this proceeding. In these circumstances, there was no need for additional investigation of FIM's speculative allegations.

403, and 503 (1982). These sections, which are reprinted in the appendix hereto, do not contain guidelines for the Commission to follow in exercising its discretion.

A. No Transfer of Control of CBS Has Occurred.

Section 310 of the Communications Act provides that no station license shall be

> transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such . . . license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

47 U.S.C. § 310(d) (1982), *reprinted in* Petition for Certiorari at 2.

Because neither Loews Corporation nor Mr. Tisch has acquired any interest that approximates majority ownership of CBS common stock, there is no question here of a transfer of legal or *de jure* control. In examining questions of *de facto* control, the Commission has long recognized that "[t]here is no exact formula by which control is presumed; such a determination must be made on the basis of the facts of each case." *Arthur A. Cirilli*, 3 F.C.C.2d 893, 897 (1966). *See also Committee for Full Value of Storer Communications, Inc.*, 101 F.C.C.2d 434, 440-41, *aff'd sub nom. Storer Communications, Inc. v. FCC*, 763 F.2d 436 (1985) (no "hard and fast rules;" "each case will turn upon its specific facts").

In particular, the Commission has never found that a specific level of stock ownership gives rise to a presumption that a minority shareholder is in *de facto* control of a licensee corporation. Although stock ownership is a factor to be considered, the Commission has stated that determinations in this field "are governed chiefly by the demonstration of [the minority shareholder's] power to dominate the management of the corporate affairs." *Benjamin L. Dubb*, 16 F.C.C. 274, 289 (1951). In this regard, the Commission has recognized that an individual shareholder may have substantial "influence" over cor-

porate decisions without being in a position of *de facto* control. Indeed, to constitute "control" within the meaning of Section 310(d), "[t]he influence must be to the degree that a minority shareholder is able to 'determine' the licensee's policies and operations, or 'dominate' corporate affairs." *News International, PLC*, 97 F.C.C.2d 349, 356 (1984).[6]

Similarly, it has been recognized that individual officers or directors may have substantial power, or "working control," within the corporation without being in *de facto* control. The Commission has stated that "[t]here may be varying degrees of working control exercised at different levels of the corporation [but] each change which may *affect* working control in a corporation does not constitute a *transfer* of control." *Tender Offers and Proxy Contests*, 59 R.R.2d 1536, 1543 (1986) (emphasis in original) (footnote omitted). Accordingly, it is recognized that while "[c]orporate officers or station managers may exercise substantial day-to-day working control; . . . FCC approval would not be required before a corporation was allowed to replace such personnel." *Storer Communications, Inc. v. FCC*, 763 F.2d at 442.

In examining the positions of minority shareholders who also serve as officers or directors, the Commission has

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[6] FIM incorrectly states in its petition that the FCC concluded in 1951 that an 8 percent CBS shareholder, William Paley, controlled the company. *See* Petition for Certiorari at 4. In *Columbia Broadcasting System, Inc.*, 7 R.R. 298 (1951), the Commission found that the acquisition of 26.574 percent of CBS's voting stock by Hytron Radio and Electronics Corp. shareholders did not constitute a transfer of *de facto* control of CBS. The Commission noted that certain directors, including Mr. Paley, had voted "a controlling block of CBS stock at the last three annual stockholders' meetings" through proxies. *Id.* at 299. The three directors discussed in the Hytron case were appointed to serve as proxies by the Board as a whole and, in each instance, the corporation's proxy statements were approved by the Board. Thus, as is the case today, authority within CBS was exercised in 1951 by the Board of Directors on behalf of the shareholders, and not by one individual.

consistently found that such individuals are not in control of licensee corporations where there is no evidence that they have the ability to select a board majority. *E.g., St. Anthony Television Corp.*, 8 F.C.C.2d 294 (1967); *Coral Television Corp.*, 29 F.C.C.2d 286 (Rev. Bd. 1971). In contrast, the agency has found substantial minority shareholders to be in *de facto* control where they have demonstrated that they have the power to select a board majority. *E.g., Metromedia, Inc.*, 98 F.C.C.2d 300 (1984); *TelePrompter Cable Systems, Inc.*, 40 F.C.C.2d 1027 (1973); *WWIZ, Inc.*, 36 F.C.C. 561, 581 (1964).

The record in this case is devoid of anything that would demonstrate that Mr. Tisch has the power to determine a board majority or otherwise dominate its deliberations. More than 75 percent of the voting power and ownership of CBS continues to be in the hands of individuals or institutions which are not in privity with Mr. Tisch. He agreed to accept his own seat on the Board and to act as Chief Executive Officer only after being asked to do so by the Board itself. With the exception of Mr. Wyman, all of the directors who were on the Board when Mr. Tisch was elected continue to serve, and none of these individuals is affiliated with Loews Corporation or Mr. Tisch. Most importantly, as the Commission has noted, "the actions that have taken place [at CBS] have occurred in the context of a corporation that has an active and independent Board of Directors that has been and remains openly antagonistic to CBS coming under the domination of any outside party." *Letter to William S. Paley*, 1 F.C.C. Rcd at 1027, *reprinted in* Appendix to Petition for Certiorari at 9a.

FIM alleges that, following the September 10 board meeting, Mr. Tisch acquired "a dominant voice" over the corporation. Petition for Certiorari at 11. In support of this assertion, FIM refers to a series of personnel changes, cost-reduction measures and divestitures that have occurred at CBS during Mr. Tisch's tenure in office. To

the extent that these changes reflect actions taken by Mr. Tisch in his capacity as Chief Executive Officer, FIM has not shown that they are in any way inconsistent with the authority granted to him by the CBS Board or, indeed, that they are inconsistent with the authority normally exercised by a CEO. In the circumstances where Mr. Tisch's actions as Chief Executive Officer have been subject to Board approval (*e.g.*, the divestiture of various operating divisions), there is no basis for concluding that Mr. Tisch improperly dictated to his colleagues on matters that were determined by action of the full Board of Directors. Indeed, the news clippings referred to by FIM and cited in the Commission's decision reflect the fact that a majority of the Board refused to pursue proposals to sell CBS Records and CBS's magazine division in late 1986, and agreed to authorize the sale of those operations in 1987 only after very substantial price increases were offered. Thus, the record before the Commission and the court of appeals demonstrated that this Board of Directors has exercised the kind of independent judgment that is inconsistent with Loews or Mr. Tisch having the power to "determine" or "dominate" the actions of the Board.

B. Further Investigation of FIM's Complaint Was Unnecessary.

As the FCC explained in its brief before the court of appeals, this is not a case where an agency has stubbornly refused to look into a matter that was brought to its attention by a complaining party. Instead, "the Commission conducted its own inquiry which elicited a detailed, and essentially undisputed, explanation of the relevant facts." Brief for Respondent Federal Communications Commission at 37, *Fairness in Media v. FCC*, No. 87-1217 (D.C. Cir. June 8, 1988). In reply to this inquiry, CBS submitted a thorough response. While FIM objects to the fact that these materials were supplied by

the licensee itself, the Commission routinely relies on factual representations made by licensees. As the Court of Appeals for the District of Columbia Circuit has stated, it would be a "regulatory nightmare" to employ discovery procedures in thousands of licensing proceedings in an effort to test the veracity of such representations. *Bilingual Bicultural Coalition v. FCC*, 595 F.2d 621, 634 (1978) (en banc). Moreover, it is clear that such efforts are not necessary:

> Ample sanctions exist for false statements knowingly made to the Commission, and licensees are well aware of their duty, not only to avoid positive untruths, but to "be scrupulous in providing complete and meaningful information."

Id. at 635 (footnotes omitted).[7]

Furthermore, to the extent that FIM asks the agency to seek out the advice of various purported "experts" on

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[7] Notwithstanding the obvious reasonableness of the FCC's decision, FIM argues that the court's judgment was arbitrary because it relied in part on factors not mentioned by the FCC in its ruling. Petition for Certiorari at 10. Specifically, FIM claims the court erred by noting that the agency's efficiency would be severely impaired if the FCC were required to conduct a more elaborate investigation into speculative claims than that which was undertaken here.

However, contrary to FIM's implication, the court's finding that the agency was not required to rely on speculation and conjecture in deciding whether to pursue the investigation merely echoed the FCC's references to this principle in its decision below. *See* CBS Inc., 2 F.C.C. Rcd at 2274, *reprinted in* Appendix to Petition for Certiorari at 12a, 13a ("conjecture . . . is not a basis for determining control;" "FIM's characterization of the CBS Directors as powerless . . . is not supported by the evidence"). Even in licensing proceedings where the FCC's discretion *is* limited by statute, it has been recognized that evidentiary proceedings are not necessary when the essential facts are undisputed and the disposition of a petitioner's claims turns on inferences to be drawn from these facts. National Ass'n for Better Broadcasting v. FCC, 591 F.2d 812, 815 (1978) (citing Alianza Federal De Mercedes v. FCC, 539 F.2d 732, 736 (1976)).

matters of corporate control (*See* Petition for Certiorari at 8), its proposal overlooks the fact that the Commission itself is the recognized expert agency for determining when a transfer of control has occurred within the meaning of its governing statute. In this regard, "[i]t is well-established that an agency's interpretation of its own statute is entitled to great deference and 'should be followed unless there are compelling indications that it is wrong.'" *Storer Communications, Inc. v. FCC*, 763 F.2d at 440 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)).

In this situation, where the agency had the benefit of a detailed report of relevant events and circumstances (and where the pertinent facts were essentially undisputed), it is clear that the Commission acted reasonably in concluding that no further inquiry or "investigation" was necessary. Thus, the court of appeals was fully justified in concluding that "no transfer triggering a need for immediate investigation had occurred." *Fairness in Media v. FCC*, No. 87-1217, slip op. at 1, *reprinted in* Appendix to Petition for Certiorari at 1a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE VRADENBURG III
ELLEN ORAN KADEN
CBS INC.
51 West 52 Street
New York, New York 10019
(212) 975-3351

RICHARD E. WILEY
LAWRENCE W. SECREST, III
PATRICIA M. REILLY
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Counsel for
Respondent CBS Inc.

October 3, 1988

STATUTORY APPENDIX

STATUTORY APPENDIX

5 U.S.C. Section 701(a) (1982)

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

47 U.S.C. Sections 154(i) and (j) (1982)

(i) Duties and Powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

(j) Conduct of proceedings; hearings

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

47 U.S.C. Section 312 (1982 and 1988 U.S.C.A. Supp.)

Administrative Sanctions

(a) Revocation of station license or construction permit

The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 of Title 18; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) Cease and desist orders

Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section 1304, 1343, or 1464 of title 18, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Order to show cause

Before revoking a license or permit pursuant to subsection (a) of this section, or issuing a cease and desist order pursuant to subsection (b) of this section, the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order or revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) Burden of proof

In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidenec and the burden of proof shall be upon the Commission.

(e) Procedure for issuance of cease and desist order

The provisions of section 558(c) of title 5 which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, or any proceeding for the issuance of a cease and desist order.

(f) Willful or repeated violations

For purposes of this section:

(1) The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.

(2) The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

47 U.S.C. Section 401 (1982 and 1988 U.S.C.A. Supp.)

Enforcement of chapter and orders of Commission; jurisdiction

(a) Jurisdiction

The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

(b) Orders of Commission

If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was

regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Upon the request of the Commission it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

47 U.S.C. Section 403 (1982)

Inquiry by Commission on its own motion

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, expecting orders for the payment of money.

47 U.S.C. Section 503 (1982 and 1988 U.S.C.A. Supp.)

Forfeitures

(a) Rebates and offsets

Any person who shall deliver messages for interstate or foreign transmission to any carrier, or for whom as sender or receiver, any such carrier shall transmit any interstate or foreign wire or radio communication, who shall knowingly by employee, agent, officer or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transmission of such messages as fixed by the schedules of charges provided for in this chapter, shall in addition to any other penalty provided by this chapter forfeit to the United States a sum of money three times the amount of money so received or accepted and three time the value of any other consideration so received or accepted, to be ascertained by the trial court; and in the trial of said action all such rebates or other considerations as received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

(b) Activities constituting violations authorizing imposition of forfeiture penalty; amount of penalty; procedures applicable; persons subject to penalty; liability exemption period

(1) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have—

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any li-

cense, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 509(a) of this title; or

(D) violated any provision of section 1304, 1343, or 1464 of Title 18;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this chapter; except that this subsection shall not apply to any conduct which is subject to forfeiture under subchapter II of this chapter, part II or III of subchapter III of this chapter, or section 507 of this title.

(2) The amount of any forfeiture penalty determined under this subsection shall not exceed $2,000 for each violation. Each day of a continuing violation shall constitute a separate offense, but the total forfeiture penalty which may be imposed under this subsection, for acts or omissions described in paragraph (1) of this subsection and set forth in the notice or the notice of apparent liability issued under this subsection, shall not exceed—

(A) $20,000, if the violator is (i) a common carrier subject to the provisions of this chapter, (ii) a broadcast station licensee or permittee, or (iii) a cable television operator; or

(B) $5,000, in any case not covered by subparagraph (A).

The amount of such forfeiture penalty shall be assessed by the Commission, or its designee, by written

notice. In determining the amount of such a forfeiture penalty, the commission or its designee shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

(3)(A) At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of Title 5. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a) of this title.

(B) If any person fails to pay an assessment of a forfeiture penalty determined under subparagraph (A) of this paragraph, after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Commission, the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review.

(4) Except as provided in paragraph (3) of this subsection, no forfeiture penalty shall be imposed under this subsection against any person unless and until—

(A) the Commission issues a notice of apparent liability, in writing, with respect to such person;

(B) such notice has been received by such person, or until the Commission has sent such notice to the last known address of such person, by registered or certified mail; and

(C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, why no such forfeiture penalty should be imposed.

Such a notice shall (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate instrument, or authorization which such person apparently violated or with which such person apparently failed to comply; (ii) set forth the nature of the act or omission charged against such person and the facts upon which such charge is based; and (iii) state the date on which such conduct occurred. Any forfeiture penalty determined under this paragraph shall be recoverable pursuant to section 504(a) of this title.

(5) No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B), is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation. The provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required, or is a cable television system operator or if the person involved is transmitting on frequencies assigned for use in a service in which individual station operation is authorized by rule pursuant to section 307(e) of this title. Whenever the requirements of this paragraph are satisfied with respect to a particular

person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

(6) No forfeiture penalty shall be determined or imposed against any person under this subsection if—

(A) such person holds a broadcast station license issued under subchapter III of this chapter and if the violation charged occurred—

(i) more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or

(ii) prior to the date of commencement of the current term of such license,

whichever is earlier so long as such violation occurred within 3 years prior to the date of issuance of such required notice; or

(B) such person does not hold a broadcast station license issued under subchapter III of this chapter and if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability.